IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

Kenny N. White, Tracie Nickell, Amanda Swagger, and John Hollis, on behalf of themselves and all others similarly situated, Plaintiffs, v. New-Indy Catawba LLC d/b/a New Indy Containerboard, and New-Indy Containerboard, LLC, Defendants.	)	C/A No. 0:21-cv-01480-SAL **ORDER**
Terri Kennedy, on behalf of herself and all others similarly situated, Plaintiffs, v. New-Indy Catawba LLC d/b/a New Indy Containerboard, and New-Indy Containerboard, LLC, Defendants.	)	C/A No. 0:21-cv-01704-SAL **ORDER**

This matter is before the court on Plaintiffs' Motion to Consolidate Cases, Appoint Interim Counsel, and for Leave to File Consolidated Amended Complaint.[1] Defendants do not oppose consolidation of the two cases nor do they oppose appointment of interim counsel.[2] Thus, the only dispute before the court is whether Plaintiffs should be granted leave to file a consolidated

[1] *White*, ECF No. 39; *Kennedy*, ECF No. 35.
[2] *White*, ECF No. 40; *Kennedy*, ECF No. 36.

amended complaint. For the reasons set forth below, the court grants Plaintiffs' motion in its entirety.

BACKGROUND AND PROCEDURAL HISTORY

There are two putative class actions pending before the court. Both seek damages from Defendants in relation to alleged emissions from a papermill located in Catawba, South Carolina. The first, *White v. New-Indy Catawba, LLC et al.* (21-1480), was filed on May 18, 2021. The second, *Kennedy v. New-Indy Catawba, LLC et al.* (21-1704) was filed on June 8, 2021. Following filing of amended complaints in the cases, Defendants filed motions to dismiss in both matters.[3] Shortly thereafter, the parties jointly moved to stay all proceedings pending a motion to consolidate the actions.[4] The court granted the joint motion to stay on September 10, 2021.[5] The motions presently before the court followed entry of the stay.

As noted above, Defendants' responses indicate that they do not oppose consolidation of the cases or appointment of interim counsel.[6] Defendants do, however, oppose Plaintiffs' request to file a consolidated amended complaint. Plaintiffs submitted replies,[7] and the matter is ripe for resolution by the court.

LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 15(a)(2), "a party may amend its pleading only with the opposing party's written consent or the court's leave" and leave should be "freely" given "when justice so requires." The Supreme Court has emphasized that the "mandate" to freely give leave is one "to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). However, "when the

[3] *White*, ECF No. 21; *Kennedy*, ECF No. 30.
[4] *White*, ECF No. 35; *Kennedy*, ECF No. 31.
[5] *White*, ECF No. 36; *Kennedy*, ECF No. 32.
[6] *White*, ECF No. 40; *Kennedy*, ECF No. 36.
[7] *White*, ECF No. 41; *Kennedy*, ECF No. 37.

amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would have been futile," leave to amend may be denied. *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006). "For a motion to amend to be denied for futility, the amendment must be 'clearly insufficient or frivolous on its face.'" *Cherochak v. Unum Life Ins. Co. of Am.*, 586 F. Supp. 2d 522, 526 (D.S.C. 2008) (citing *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 510–11 (4th Cir. 1986)).

DISCUSSION

I. Consolidation and Appointment of Interim Counsel.

At the outset, the court briefly addresses Plaintiffs' unopposed requests—for consolidation and appointment of interim counsel. The court agrees that consolidation is appropriate in accordance with Rule 42, FRCP. Fed. R. Civ. P. 42(a)(2) ("If actions before the court involve a common question of law or fact, the court may . . . consolidate the actions[.]"). Both cases seek damages related to emissions from Defendants' Catawba, South Carolina plant. As a result, both cases present common questions of law or fact, and consolidation will promote judicial economy and efficiency. The *White* and *Kennedy* cases are consolidated and may proceed under the caption, *In re New Indy Emissions Litigation*.

The court also agrees to appoint interim class counsel in accordance with Rule 23, FRCP. Fed. R. Civ. P. 23(g)(3) ("The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action."). Appointment of interim counsel is in the discretion of the court. *See May v. Patriot Payment Grp., LLC*, No. 5:15-cv-27, 2016 WL 11501481, at *2 (N.D. W. Va. Jan. 5, 2016). The Advisory Committee notes to Rule 23 indicate that appointment of interim counsel during the pre-certification period may be appropriate where there could be "rivalry or uncertainty" among attorneys and the appointment is necessary

to protect the interests of the putative class. And when appointing interim counsel, courts generally look to the Rule 23(g)(1)(A) factors. *See, e.g., Neal v. Wal-Mart Stores, Inc.*, No. 3:17-cv-00022, 2019 WL 3407143, at *3 (W.D.N.C. July 26, 2019) (applying Rule 23(g)(1)(A) factors).

Here, Plaintiffs request appointment of attorneys from four law firms as interim class counsel—T. David Hoyle of Motley Rice LLC, Richard A. Harpootlian of Richard Harpootlian, P.A., Philip C. Federico of Schochor, Federico & Staton, P.A., and Chase T. Brockstedt of Baird Mandalas Brockstedt, LLC. The court reviewed the resumes and other materials provided in support of the motion and concludes that the attorneys have expended significant work in identifying and investigating potential claims in the two cases. Further, the court concludes that all four attorneys have considerable experience handling class actions and complex litigation, are knowledgeable of the applicable law, and will commit the necessary resources to present the putative class. *See* Fed. R. Civ. P. 23(g)(1)(A). Given the size and complexity of the consolidated case and the experience these attorneys have in working together on prior matters, the court concludes appointment of four attorneys as interim counsel is appropriate.

II. Leave to Amend Complaint.

The only point of disagreement between the parties is on whether Plaintiffs should be allowed leave to amend their complaint. Plaintiffs argue that because this matter is in its early stages, Defendants will not be prejudiced by the timing of the proposed amendment. Further, they submit that the proposed amendment does not raise any new legal theories, is based on the same facts already pleaded in the *Kennedy* and *White* cases, and is intended to ensure efficient prosecution of the case.

In response, Defendants make four arguments: (1) further amendment in light of the prior five versions of the complaint is prejudicial to them; (2) Plaintiffs unduly delayed in seeking

amendment; (3) the motion is made in bad faith; and (4) the proposed amendment is futile. The court addresses each argument in turn.

A. Prejudice and Undue Delay.

Defendants' prejudice argument surrounds the fact that five preceding complaints have been filed between the three[8] matters. In response to the five preceding complaints, Defendants filed motions to dismiss. According to Defendants, having to file another motion to dismiss in response to the proposed amended complaint in the consolidated action will cause them "substantial hardship and prejudice." The court disagrees.

"Whether an amendment is prejudicial will often be determined by the nature of the amendment and its timing." *Laber*, 438 F.3d at 427. Delay alone is insufficient. *Id.* "A common example of a prejudicial amendment is one that 'raises a new legal theory that would require the gathering and analysis of facts not already considered by the [defendant] and is offered shortly before or during trial.'" *Id.* (citing *Johnson*, 785 F.2d at 509). "An amendment is not prejudicial, however, if it merely adds an additional theory of recovery to the facts already pled and is offered before any discovery occurred." *Id.*

In this case, timing is not a problem. While there were several cases at one point in time, none of the cases reached the discovery phase. Moreover, in *White*, the first amended complaint, ECF No. 6, was filed within the time provided by Federal Rule 15(a)(1)(A), such that leave of court was not required. And in *Kennedy*, the first amended complaint was filed just a few months ago on August 11, 2021, with the consent of Defendants. [ECF Nos. 23, 26, 27.] The motion seeking leave to file a consolidated amended complaint does not suffer from *undue* delay.

[8] The third matter, *Landsdown et al. v. New-Indy Catawba, LLC et al*., Civil Action No. 0:21-cv-01586, was voluntarily dismissed on August 24, 2021.

The nature of the amendment does not pose a problem in terms of prejudice either. Defendants' opposition fails to identify any new facts or new theories that arise as a result of the proposed amendment. Rather, Defendants submit that it is Plaintiffs' "sixth bite at the apple" that is unfair. The court has no intention of allowing excessive serial amendments. However, having to file another motion to dismiss post-consolidation does not seem to meet the seemingly high threshold for disallowing an amendment this early in the case. Because Defendants are, "from the outset[,] [] fully aware of the events giving rise to the action, an allowance of the amendment [does] not in any way prejudice the preparation of [their] case." *Davis v. Piper Aircraft Corp*., 615 F.2d 606, 613 (4th Cir. 1980).

B. Bad Faith.

In addition to prejudice and undue delay, Defendants submit that the proposed amendment is made in bad faith. Defendants point to the fact that Plaintiffs have not learned anything new about the case that they did not already know when the original cases were filed. Defendants submit that it is Plaintiffs' delay in consolidation alone that triggered the proposed amendment. In reply, Plaintiffs submit that they have learned considerably more about the cases since their initial filings in May and June, and Defendants have not submitted any evidence of bad faith.

The court agrees with Plaintiffs. There is no evidence before the court that makes it "obvious that plaintiffs had knowledge" of the need for consolidation and amendment prior to filing the motion but then acted in bad faith by delaying the filing of the motion. *Windsor Card Shops, Inc. v. Hallmark Cards, Inc*., 957 F. Supp. 562, 571 (D.N.J. 1997); *Harless v. CSX Hotels, Inc*., 389 F.3d 444, 447 (4th Cir. 2004) ("Motions to amend are typically granted in the absence of an improper motive[.]"). Thus, the court is unwilling to conclude that Plaintiffs acted in bad faith here.

C. Futility.

Defendants' final argument in opposition to the proposed amendment is futility. For leave to amend to be denied for futility, the amendment must be "clearly insufficient or frivolous on its face." *Johnson*, 785 F.2d at 510. "Futility is apparent if the proposed amended complaint fails to state a claim under the applicable rules and accompanying standards[.]" *Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 471 (4th Cir. 2011). Thus, the futility analysis "requires a preliminary assessment of the allegations of the proposed amendment in light of the substantive law on which the additional claims are based." *Kramer v. Omnicare ESC, LLC*, 307 F.R.D. 459, 464 (D.S.C. 2015).

In this case, Defendants seem to argue that because the proposed amendment does not change or impact the arguments made in the currently pending motions to dismiss, the proposed amendment is futile. This case differs, however, from the cases on which Defendants rely. Plaintiffs are not proposing an amended pleading to "correct" any alleged deficiencies in their original pleadings. Instead, they are asking the court to allow an amendment post-consolidation to streamline the consolidated litigation. The court, therefore, cannot agree that the proposed amendment is futile.

Finally, the court finds that it is too early in the litigation to prohibit future amendments. There is not yet a scheduling order in place for this case. In almost all cases, the initial scheduling order includes a deadline for a party to move to amend its pleading. The court concludes that such a deadline will be appropriate in the consolidated action.

CONCLUSION

For the reasons outlined herein, Plaintiffs' Motion to Consolidate Cases, Appoint Interim Counsel, and for Leave to File Consolidated Amended Complaint, ECF Nos. 39 (*White*, 21-1480);

35 (*Kennedy*, 21-1704), is **GRANTED**. The *White* and *Kennedy* cases are consolidated and may proceed under the caption, *In re New Indy Emissions Litigation*. Plaintiffs have until December 15, 2021 to file the Consolidated Amended Complaint, ECF Nos. 39-6 (*White*, 21-1480); 35-6 (*Kennedy*, 21-1704).

IT IS SO ORDERED.

/s/ Sherri A. Lydon
United States District Judge

December 8, 2021
Florence, South Carolina